

No. 15854

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United States  
Court of Appeals  
for the Ninth Circuit

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HAL GILFILEN,

Appellant,

vs.

CITY OF SEWARD, a Municipal Corporation,

Appellee.

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Transcript of Record

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Appeal from the District Court for the  
Territory of Alaska,  
Third Division

FILED

APR - 9 1958

PAUL P. O'BRIEN, CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

### For Appellant:

McLAUGHLIN & ATKINSON,

First Nat'l Bank Bldg.,

Anchorage, Alaska;

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1155 Jones, St.,

San Francisco, Calif.;

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Turnagain Arms Bldg.,

Anchorage, Alaska.

### For Appellee:

RAYMOND PLUMMER,

220 Central Bldg.,

Anchorage, Alaska;

CHARLES A. LEGGE,

BRONSON, BRONSON & McKINNON,

220 Bush St.,

San Francisco, Calif.





In the District Court for the District  
of Alaska, Third Division

Cause No. A-11,718

HAL GILFILEN, an Individual,

Plaintiff,

vs.

CITY OF SEWARD, an Alaskan Municipal Corporation,

Defendant.

### COMPLAINT

Plaintiff complains of the defendant, and for cause of action alleges:

#### I.

That at all times hereinafter mentioned defendant was, and now is, a municipal corporation organized and existing under the laws of the Territory of Alaska.

#### II.

That at all times hereinafter mentioned there has been located within the corporate limits of the defendant city a much used public street and highway known and designated as Fourth Avenue, which said Fourth Avenue had laid out upon it, along its east side, a public sidewalk extending parallel to said Fourth Avenue.

#### III.

That the public street and sidewalk referred to in paragraph II had, for many years prior to February 12, 1954, and at all times since then, has been treated

and controlled by defendant city as a public street, highway and sidewalk.

#### IV.

That, on the 12th day of February, 1954, and for a long period of time prior thereto, snow and ice had accumulated upon the sidewalk referred to in paragraph II to such an extent that travel over, across, and upon the same was insecure and unsafe for pedestrians in that said snow and ice was accumulated upon said sidewalk in an irregular shape; was packed and frozen, and so elevated, uneven, and ridged as to afford an insecure footing to those walking upon the said sidewalk.

#### V.

That defendant knew, or by the exercise of ordinary care and diligence, could have known, of said unsafe condition of said sidewalk and could have removed said snow and ice in a reasonable time before the plaintiff slipped and fell as hereinafter stated.

#### VI.

That on the 12th day of February, 1954, at about the hour of eight o'clock p.m., the plaintiff was carefully and lawfully walking in a northerly direction on the aforesaid sidewalk when, at a point abutting the property, legally described as the north 15' of Lot Twenty-seven (27), Block Nine (9), Seward Townsite, owing to the aforesaid unsafe condition of the sidewalk, plaintiff slipped and fell on his left hand and wrist.

VII.

As a result of such slipping and falling plaintiff had his wrist broken, his elbow dislocated, received a chipped bone in his shoulder, and was otherwise injured, and still has a partial disability from such injuries; was prevented from transacting his business; suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization.

Wherefore, plaintiff prays judgment against defendant as follows:

1. For the sum of \$7,166.10 for medical attention and hospitalization expenses incurred.
2. For the sum of \$13,675.00 for wages paid to a substitute while plaintiff was prevented from transacting his business.
3. For the sum of \$25,000.00 for pain and suffering.
4. For costs of this action.
5. For such other and further relief as in the premises are just.

McLAUGHLIN & ATKINSON,  
Attorneys for Plaintiff;

By /s/ KENNETH R. ATKINSON.

United States of America,  
Territory of Alaska—ss.

Now, on this 16th day of December, 1955, Hal Gilfilen, being first duly sworn, on his oath deposes and says: That he is the plaintiff named in the foregoing complaint; that he has read the same, knows the contents thereof, and that the same is true as he verily believes.

/s/ HAL GILFLEN.

Subscribed and sworn to before me this 16th day of December, 1955, at Anchorage, Alaska.

[Seal]      /s/ KENNETH R. ATKINSON,  
Notary Public in and for  
Alaska.

My commission expires: September 2, 1959.

Plaintiff demands a jury trial in this cause.

[Endorsed]: Filed December 16, 1955.

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[Title of District Court and Cause.]

### ANSWER

The defendant, City of Seward, for answer to the plaintiff's complaint admits, denies and alleges as follows:

#### I.

Admits the allegations contained in Paragraph I.

II.

Admits the allegation contained in Paragraph II.

III.

Denies the allegations contained in Paragraph III.

IV.

Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph IV and the same are therefore denied.

V.

Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph V and the same are therefore denied.

VI.

Denies all allegations contained in Paragraph VI except that the plaintiff slipped and fell on February 12, 1954.

VII.

Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph VII and the same are therefore denied.

First Affirmative Defense

Defendant alleges that any injuries or damage sustained or suffered by the plaintiff at the time and place and on the occasion alleged in his complaint, were caused in whole or in part, or were contributed

to, by the negligence, fault, or want of care on the part of the plaintiff, and not by any negligence, fault, or want of care on the part of the defendant.

### Second Affirmative Defense

Defendant alleges, that if in fact, said sidewalk was in an unsafe condition as alleged in plaintiff's complaint, that plaintiff had full knowledge thereof, or by the exercise of ordinary care and diligence could have known the condition thereof, and yet with such knowledge plaintiff nevertheless voluntarily chose to use such sidewalks; that if in fact plaintiff sustained the injuries and damages alleged in his complaint they were caused by a risk or chance which he well knew and plaintiff at the time of using said sidewalk had voluntarily assumed all risk or chance incidental to or arising out of the use thereof.

Wherefore, defendant having fully answered plaintiff's complaint prays that plaintiff take nothing thereby and that defendant have and recover of and from the plaintiff his costs and disbursements herein, including a reasonable attorney's fee to be fixed by the court.

/s/ RAYMOND E. PLUMMER,  
Attorney for Defendant.

Service of copy acknowledged.

[Endorsed]: Filed January 26, 1956.



In the District Court for the District  
of Alaska, Third Division

No. A-11,718

HAL GILFILEN, an Individual,

Plaintiff,

vs.

CITY OF SEWARD, an Alaskan Municipal Corporation,

Defendant.

DEPOSITION OF HAL GILFILEN

Appearances:

KENNETH ATKINSON, of  
McLAUGHLIN & ATKINSON,  
For Plaintiff.

RAYMOND E. PLUMMER,  
For Defendant.

Pursuant to Notice, hereto attached and made a part of this deposition, the deposition of Hal Gilflen was taken before Gara H. Lyon, Notary Public in and for the Territory of Alaska, at the office of Raymond E. Plummer, 225 Central Building, Anchorage, Alaska, on this 23rd day of February, 1956, at the hour of 2:00 p.m.

## PROCEEDINGS

## HAL GILFLEN

being first duly sworn on oath, by Gara H. Lyon,  
Notary Public, deposes as follows:

## Direct Examination

By Mr. Plummer:

Q. Will you state your full name for the purposes of the record? A. Hal O. Gilflen.

Q. How long have you resided in Seward?

A. Ten years December 1st—last.

Q. And you are the plaintiff in a case entitled Hal Gilflen, an individual, plaintiff, vs. City of Seward, an Alaskan Municipal Corporation, defendant? A. Yes.

Q. What is your present occupation or business?

A. I have varied business interests. I own two pieces of business property, also Gil's Lounge, an apartment house and office building. I did have the Gateway Drug Store in my building.

Q. That is all in the City of Seward, is it?

A. Yes.

Q. Were you engaged in the same business on February 12, 1954? A. Yes; I was.

Q. Did you on that date fall and injure your left arm and wrist? A. Yes. [2\*]

Q. And where was it that you fell?

A. About five or six feet north of what we call the Alaska Shop—between that and another build-

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\*Page numbering appearing at foot of page of original Reporter's Transcript of Record.



(Deposition of Hal Gilflen.)

ing. It is in a vacant piece of property. On Fourth Avenue.

Q. Can you recall the approximate time this occurred?

A. It seems to me that it was about 8:15 p.m.

Q. Please state in your own words the facts and circumstances pertaining to your fall?

A. I had left my place of business and was going up, or rather north, to a store that I own the license in, a retail liquor store, where my wife and a lady were visiting. I stepped up into the ice flow that exists in front of this piece of property. When I had taken several steps, about three as I recall, there my feet went straight up. I threw out my arm to catch myself and at that time I weighed 210 pounds and I lit with my hand and also injuring my wrist and hand, dislocated the elbow and had several other impacts which the doctors have arrived at. I was picked up by a man named Ray O'Hara who is the City Manager of Seward and was taken to the Seward General Hospital where they called Dr. Francis J. Phillips, and after giving me a sort of sedative he attempted to X-ray my wrist and elbow, which by this time had swollen considerably. Do you wish a continuation, Mr. Plummer, of this thing other than just the fall?

Q. Just the fall at this time. You referred to Fourth Avenue. I believe this happened on the East side of Fourth Avenue? [3]           A. Yes.

Q. Would you draw us a sketch of Fourth Ave-

(Deposition of Hal Gilfilen.)

nue, showing your place and where the Alaska House is, etc.? (Witness draws diagram.)

A. Maybe this will do it. Here is the apartment house and I came out of the doorway here and went past the Alaska House or Shop. (Witness explains diagram.)

Q. Can you draw the sidewalk and approximately where your store is?

A. I was proceeding along the sidewalk—this is not located——

Q. Well, then, will you erase the first line there, please?

A. Yes. It seems to me that, as I recall, I was very near the center of the sidewalk, the lowest portion of which was grooved out some.

Q. What is the place to which you were going?

A. Gil's Liquor Store.

Q. Will you put that on, please, there together with the sidewalk? One further thing. Will you put the directions on there?      A. North and South?

Q. Yes.

A. I believe it almost due North, however, it is just a fraction off.

Q. Then while you still have it, will you sign it and date it?      A. What day is this—the 25th?

Q. (By Mr. Atkinson): The 23rd.

A. The 23rd.

Q. Now, I believe you stated that immediately prior to your fall, or the place you left prior to your fall was Gil's Lounge?      A. Yes. [4]

Q. And how long had you been there?

(Deposition of Hal Gilflen.)

A. I live there in the rear of my place of business.

Q. Had you been working on the bar?

A. No, I had been in the process of completing some finish work on the drug store—on the new building.

Q. The name of the place you were going to was what?      A. Gil's Liquor Store.

Q. Had you consumed any intoxicating liquor on the 12th day of February, 1954?      A. None.

Q. And you say you were living in the rear end of the Lounge?      A. Yes.

Q. So the place you fell would be to the north of your place of business?      A. Yes.

Q. That is, one of your places of business?

A. Yes. One-half of an eighty foot building is the Lounge and the other half is apartments.

Q. Will you please state the names and addresses, if you know that, in whose company you had been or who had been in from five p.m. until the time the accident occurred?

A. That will be a little difficult to remember. I am sure of one—Orville Smith—who is an employee of mine. I do not recall who else was there at the time although the place was quite well filled. [5]

Q. Could we do this then—leave this question open and if you recall any other persons' names, will you submit them to Mr. Atkinson?

A. Yes, I expect it could be that I will recall several of them.

(Deposition of Hal Gilfilen.)

Q. Do you recall the day of the week? It fell on a Friday, did it not?

A. Yes. I was aware of it being Lincoln's Birthday.

Q. Can you recall the day or the approximate number of days prior to your accident when snow last had fallen in Seward?

A. I don't think I can.

Q. Well, can you recall whether it was a matter of days or a matter of weeks?

A. Well, it was not too far back; however, as I recall the sidewalk there had not been cleaned all season. I had cleaned my place but there was a good eight inches of packed snow there at that time—actually was ice. It's still there today. There was four and a half or five inches of ice when I left there the other day. It is all packed and frozen.

Q. Could you—strike that—then would you say that this accumulation of snow and ice was not removed at any time?

A. All winter long.

Q. Will you state the number of times you walked past the point where you fell during the thirty days prior to the day you fell?

A. I would say most every day.

Q. Do you recall or do you have any recollection as to the temperature [6] in Seward on February 12th?

A. I am quite sure it was freezing temperature and damp. Somewhere close to the thirties.

Q. Near the thirties or below?

(Deposition of Hal Gilfilen.)

A. Near, I would say. I am not too sure about that.

Q. Had the temperature been about the same for a two-week period prior to the accident?

A. If I recall properly it had warmed up and made it a little slick there. It seems to me that it had. However, I had been working indoors all that portion of the weather and I was not too aware of conditions. I just didn't pay too much attention to it.

Q. Now, in your complaint, I call your attention to Paragraph IV, starting on page one and going over on page two. You have alleged "that on the 12th day of February, 1954, and for a long period of time prior thereto, snow and ice had accumulated upon the sidewalk referred to in Paragraph II to such an extent that travel over, across and upon the same was insecure and unsafe for pedestrians in that said snow and ice was accumulated upon said sidewalk in an irregular shape, was packed and frozen and so elevated, uneven and ridged as to afford an insecure footing to those walking upon said sidewalk." Is that a true statement?

A. Yes.

Q. Do you make that statement based upon your own knowledge and observation?

A. Yes, sir [7]

Q. And this condition of the sidewalk as to accumulated ice was plainly visible, was it not?

A. Yes, sir.

Q. To your knowledge had anyone in Seward fallen at this particular point because of this ice



(Deposition of Hal Gilflen.)

and snow?           A. Yes.

Q. Will you give me the names of such persons, if you know, and the dates they fell?

A. Well, Lola LeQuier for one, and my wife, Claire, the same night I fell. As a matter of fact she was coming down the street to see how I was going.

Q. Do you recall whether Mrs. LeQuier fell before or after February 12th?           A. Before.

Q. It was at this same point?

A. I believe so. At least she was handling the taxicab company which rented space from my building. It was about the same place. There was the distance of the Alaska Shop between the cab office and where she fell.

Q. Was the cab office in the old Palace Cafe?

A. No, south of the Alaska Shop and adjacent to it. In the portion of the red brick building that I own.

Q. Other than your wife and Mrs. LeQuier do you know of any other persons who fell at this point?

A. I have—I remember someone coming in and telling me they had. [8] I just don't remember who. I believe someone reported to Pat Williams, the insurance claim adjuster, they had fallen. It is a hazy recollection. I am not too positive.

Q. Can we leave that open, also, and if you recall any additional names will you supply those to Mr. Atkinson so I might obtain them? There is no need to prolong this.           A. Yes.

(Deposition of Hal Gilfilen.)

Q. Now, had you prior to the time you fell there called this to the attention of any city official?

A. Yes, I had. I was a member of the Planning & Zoning Commission at the time this happened and I had discussed it on perhaps two or three occasions with other members of the commission. We discussed some way or a request that the Council enforce that ordinance.

Q. To enforce the ordinance in general or at that particular place?

A. Not that particular instance. All the vacant properties. There were some flagrant violators on that side of the street which made it very difficult to maintain.

Q. How many other vacant properties were there on the east side of the street?

A. Well, there was a lot next to the Seward Plumbing & Heating that was vacant.

Q. Was that to the north?

A. Just beyond the liquor store. Then on the south end there was a vacant corner 90' by 100'. We took up one directly across [9] from the bank on 4th—a vacant corner, and discussed ways and means of getting it removed and now they have.

Q. Is that the last lot on the west side of the store and north of the Seward Steam Laundry?

A. Yes.

Q. And it is your recollection this was discussed among the members of the Planning and Zoning Commission?

A. Yes.

(Deposition of Hal Gilflen.)

Q. Where—who were the members of that commission?

A. Robert Baumgartner, the attorney, was chairman of that group. I don't know whether Pat Williams was still a member at that time or not. It seems to me she was. I know she was an original member of it. Another was Vance Hitt. Jack Werner but he resigned when he went to Juneau. I am just not sure. There were seven members of the board but they have changed some. I think Bob Stanton was on it.

Q. Who owned the property abutting or adjacent to the sidewalk where you fell?

A. It is my understanding Robert Baumgartner owns it.

Q. What type of foot gear were you wearing, to the best of your recollection, at the time of your falling?

A. I was wearing a pair of brown oxfords. I didn't have boots on—because—just oxfords. I don't recall whether or not I had on rubbers. A check with the doctor might enlighten me on that.

Q. Then it is your recollection that you were just wearing oxfords [10] and that possibly by checking with Dr. Phillips or at the hospital you find you were wearing rubbers?

A. I recall they undressed me at the hospital, but I am not just sure what I had on.

Q. Can you recall the velocity of the wind at eight p.m.?

A. There was no indication of any, as I recall.



(Deposition of Hal Gilfilen.)

Q. Now, calling your attention to Paragraph V of your verified complaint, you allege, in part, that the defendant, meaning the City of Seward, "knew or by the exercise of ordinary care and diligence could have known of said unsafe condition of said sidewalk \* \* \*" Is that a true statement?

A. Undoubtedly they knew of its condition.

Q. And by that you mean that the City of Seward likewise should have known of that condition?

A. I am sure they did.

Q. I believe you previously stated that the accumulation of snow and ice, which was practically all ice, was about eight inches in depth?

A. Yes.

Q. I believe you also testified that the remainder of the sidewalk on the east side of Fourth Avenue, except adjacent to the vacant lots in that particular block, snow had been removed?

A. Yes, it had been.

Q. Was this likewise true of the sidewalk on the west side of Fourth opposite the point where you fell? Was the sidewalk cleared there? [11]

A. In part—with the exception of that area I mentioned before. I am sure all of it was kept clean in front of the stores. I know that we neglected ours for one day the police would serve us with notices. As a matter of fact I have a copy of one of the notices.

Q. Am I clear that on the west side of Fourth Avenue the only vacant lot is at the extreme north end beyond the Seward Laundry? A. Yes.

(Deposition of Hal Gilfilen.)

Q. I believe you have already stated you had taken two or three steps from the point where the sidewalk was cleared to the point of your fall or in the neighborhood?      A. Yes.

Q. What is the approximate total length of that area where the snow and ice was accumulated where you fell?

A. Twenty-two feet is the length of that lot.

Q. Could you write that in, showing the distance?

A. Yes. And incidentally that twenty-two feet that I refer to, I am sure, is the amount owned by Mr. Baumgartner. Another short section was retained by Mr. Matich when he built the Palace Cafe.

Q. Were there any eye witnesses to your fall?

A. Yes.

Q. Will you please state their names, if you know?

A. There was one who was a taxicab operator with the Northern Cab Company whose last name—some man by the name of Woods, that is the only name I know. In fact, all I know is “Woody.” [12] Arnold Berne is another.

Q. Anyone else?

A. The City Manager did not witness the fall. He came by when they were picking me up. This man Woods helped me get back on my feet.

Q. Then those two are the only ones you know, Mr. Berne and Mr. Woods?

A. Mr. Berne was sitting in a car directly by

(Deposition of Hal Gilflen.)

where I fell and facing the walk. You know we have 30-degree angle parking.

Q. Then Mr. Woods arrived at the point where you fell before Mr. O'Hara did?

A. Yes. He was stationed in front of the Alaska Shop entrance about fifteen feet from where I fell.

Q. Do you know Mr. Berne's address? Does he still reside in Seward?

A. He and his brother own the Seward Laundry.

Q. You are pretty sure he still resides in Seward? A. I am quite sure.

Q. Will you obtain that information and give it to Mr. Atkinson? A. Yes.

Q. Do you think you can obtain Mr. Woods' full name?

A. Yes. He worked for the Legion Cab and Woods is an employee now. I believe, on the new dock construction.

Q. Did anyone accompany you to the hospital?

A. Yes, Mr. O'Hara drove me there in his car—the City Manager.

Q. Was Dr. Phillips there or did someone call him to the hospital? [13]

A. I think he was there—in fact I am quite sure.

Q. Did Mr. O'Hara remain with you?

A. Yes, for a full hour.

Q. How long did you remain there?

A. All night.

Q. Dr. Phillips had completed his examination

(Deposition of Hal Gilflen.)

then, including X-rays, prior to the time that Mr. O'Hara left?

A. Yes, and my wife was there also while the doctor was taking an X-ray and giving me a shot. And Mrs. Losey, the lady who operates Gil's Liquor Store.

Q. What, if anything, did the doctor state as to the nature and extent of the injuries you sustained in the fall you described?

A. I believe that would have to be contained in his report which I am sure he will submit. I couldn't give it in the proper language. I might not—I couldn't describe it fully enough.

Q. Were you confined in the Seward Hospital other than overnight?      A. That is all.

Q. When you returned—when you left there and returned to your home to convalesce?

A. Yes.

Q. Did Mr. O'Hara at any subsequent time contact you and visit you to see how you were getting along?

A. Yes, almost daily for a couple of weeks.

Q. That was immediately after the accident?

A. Yes. [14]

Q. Did you on any occasion tell him or relate to him the nature and extent of the injuries you had received?

A. No, I didn't. I didn't know myself. I was sure of the dislocation of my elbow because it was bent badly—back toward my shoulder.

(Deposition of Hal Gilflen.)

Q. What, if anything, did Dr. Phillips do for this? Did he put it in a splint, for instance.

A. He splinted the elbow and after reading the X-rays he said that he wanted to send them to a bone specialist because he was not sure of his own reading. He sent them air mail to a Dr. Harmon. He is a specialist but I don't know his address. I could get it. Dr. Phillips got back a report from Dr. Harmon but I am not too well versed on the phraseology of it. I do know there was a dislocation of the elbow and considerable injury to the wrist and it was so painful in the wrist area that I couldn't use it or move it. It was badly swollen and they rigged up a splint to the whole hand. It was considerably benefitted with an Ace bandage which I wore about a month. I also wore a modified elbow sling, which I still have. After talking to the other doctors we rigged it up and fastened it around my body. I slung it up because I had so much pain at the shoulder and was trying to relieve the pain but that didn't seem to do very much good. As a matter of fact as it eventually turned out that didn't help a bit. There was continual swelling that never did stop. It was so swollen and turned green that they were afraid of the loss of [15] my arm through complications. I was advised to find someone to cure it, Dr. Phillips being very busy as the chief surgeon at the Sanitarium and while he, perhaps, did everything he could, I was advised to seek someone who could do me more good. I was advised from a friend who is a doctor in private practice



(Deposition of Hal Gilflen.)

and who was a guest in our home. His name is Dr. Joseph Sheldon and he is a man who used to be a general physician in Seward and my wife was employed by him two years as office nurse. He was not our doctor but just a friend but he tried to assist the doctor in getting some apparatus and getting my arm into it. It was not part of his work, nor did he treat me.

Q. Can you obtain the address of this Dr. Harmon to whom the X-rays were sent and supply it to Mr. Atkinson, who, in turn, can furnish it to me?

A. Yes.

Q. Now what is the official capacity of Mr. O'Hara? A. He was the City Manager.

Q. Was he serving in that capacity on February 12, 1954? A. Yes, sir.

Q. Did he continue in that capacity until the time, or about the time, he left Seward?

A. Yes, he did.

Q. Do you remember when he resigned or left there?

A. It was in my absence but I believe it was the 2nd of April or about that time. He left right after the first—along there. [16]

Q. Will you please state the date, or approximate date, when you communicated to the City of Seward that you intended to hold them liable for your injury?

A. I had proceeded to Seattle to continue treatment with a Dr. Buckner, who is a specialist in orthopedic and bone surgery—

(Deposition of Hal Gilfilen.)

Q. When was that?

A. April 6, 1954. And on arriving there I learned that Dr. Buckner was in Sun Valley, Idaho, and had retired. In his stead there was a Dr. B. E. McConville. I had with me a jacket file from Dr. Phillips explaining the nature of the injury and also the X-rays, which Dr. McConville examined that same day I arrived there and he took a series of X-rays of his own. His findings were considerably more, I believe, than had been noted at the time the thing was so swollen and so painful that the first X-rays didn't get it all since it was not under the machine properly. After seeing those he did, according to my understanding, and his determination it appeared that they had better have waited until sometime afterward to place me in position to take the X-rays to show the damage.

Q. When was it with reference to your trip to Seattle that you made known to the City of Seward your intention to hold them liable?

A. I wrote to the City of Seward and that letter is a matter of record. I don't recall the exact date but they have it, I am sure. I have their answer requesting assistance and further care to the injury. When I learned it was of considerable [17] extent, more than I had imagined and would require considerable treatment and I was not able to finance myself too much longer and I wrote and requested assistance from them. I know they wrote a letter to their insurance company and I know I have one of

(Deposition of Hal Gilflen.)

theirs which I received afterwards and they offered assistance.

Q. This is on your trip out in April of 1954?

A. It could have been that one or a subsequent one. I made four in all. Actually, I believe it was on the second one. Maryland Casualty had an agent, one of their young men, named Sullivan, contact me.

Q. You think that was on your second trip?

A. I believe so.

Q. When did you make your second trip out?

A. In July.

Q. Now, with reference to the letter you wrote, was that right after your return to Seward or while you were still in Seattle?

A. I wrote them from Seward, I am quite sure. I wrote after I returned to Seward and learned it was not as cured as I thought.

Q. How long did you remain in Seattle on your first trip—the April 6th one?

Mrs. Gilflen: He went out the 6th of April and came back the 29th of May.

A. Let me have this file and I can tell you. I left Anchorage on the 7th. Wait a minute—that isn't the right one. Here we are. It was May 29th I left Seattle. [18]

Q. During that period of time had you seen any other doctor than Dr. McConville or were you only under his care?

A. In Seattle?

Q. Yes.

A. Well, there were several doctors in the office of Dr. McConville. Dr. McConville himself and Dr.



(Deposition of Hal Gilflen.)

Fletcher and Dr. Callahan, who examined me. It, incidentally, was not a thorough examination. It was more a confirmation of the fact that they could not manipulate the elbow and keep the accretion of fluid in that joint without either going into it or using needles. They discussed it as they took turns in examining it. I was unable hardly to stand the therapy treatment, it was so painful the first time I was out.

Q. From whom were those therapy treatments taken?

A. The therapist's name is Ed Turnsen. I was sent to Room 222 in the Cobb Building.

Q. And were you treated by any other doctors while in Seattle on that trip?

A. No other doctors, no.

Q. What course of treatment did they pursue, if any?

A. A series of intravenous shots daily for—let me try to get the exact time, if I can. I believe it was about nine months until I could quit. I had calcium gluconate, cortisone, ACTH and Vitamin B-12. I certainly did have my system full of it. I had those daily five days a week and therapy treatments [19] concurrent with that every day. I followed those treatments through after returning to Seward at the Seward San. The therapist there is a Mrs. Aylen. I also continued the intravenous treatments which were given first by Dr. Hall and then by Dr. Staff who took his place.

(Deposition of Hal Gilflen.)

Q. The last two doctors you mentioned—they were at Seward?

A. Yes, and I came back from Seattle with instructions from my doctors, in writing, to them. They have correspondence as to how they were to proceed with the treatments.

Q. When did you make your second trip?

A. I left Anchorage on the 7th. The tickets were purchased in Seward on the 6th and I left here on the 7th of July.

Q. How long did you remain in Seattle that time?

A. Until the 21st of August.

Q. Under whose care were you at that time?

A. Dr. McConville.

Q. Anyone else?

A. No.

Q. Then when was your third trip outside made?

A. The 21st of February, 1955?

Q. The 21st?

A. Yes, that is leaving Anchorage. That is the date on the airline ticket.

Q. And when did you return to Seward?

A. The 26th of March. [20]

Q. Going back to the second trip out, what course of treatment did Dr. McConville pursue then?

A. It was a continuation of the intravenous shots but there was a change in the medicines because the others were creating such a physical disorder that I was unable to eat properly and I had lost thirty pounds of weight and my hair had

(Deposition of Hal Gilfilen.)

turned white. He was a little afraid it was the wrong medicine and it sure was.

Q. Then he changed the medicine?

A. He made a complete re-examination and ordered an allergy test. Oh, that was the third time I had to go back because of this terrific disorder. I couldn't eat anything that would not make me ill. I was aware of what was causing the trouble because I seemed to have a terrific gastric upheaval from my stomach. We learned that the milk which I had been drinking was killing me, slowly but surely because I was too full of calcium. I love milk and cheese and all these foods were overacting, so they changed completely the shots I was getting. And they put the shoulder bone into the socket.

Q. By whom were you attended between the second and third trips?

A. Between the trips to Seattle, you refer to?

Q. Yes.

A. In the first instance by Dr. Staff and Mrs. Aylen, the therapist.

Q. While you were in Seattle on the third trip who attended you?      A. Dr. McConville.

Q. Anyone else? [21]

A. No—and Ed Turnsen, the therapist.

Q. What was the course of treatment during that period of time?

A. I am getting confused on the amounts and types of treatment. I am sure you can get that very minutely from his daily records that were kept. I know he has a file, quite complete.

(Deposition of Hal Gilflen.)

Q. After the third trip, when you returned to Seward, under whose care were you—who was the doctor?      A. It was still Dr. Staff.

Q. Then when did you make your fourth trip outside?

A. July the 16th, in 1955. It was the 18th out of Anchorage. The 16th is the date of purchase on this ticket.

Q. What date did you return?

A. August 25th.

Q. And what doctors cared for you while you were in Seattle during that period of time?

A. Dr. McConville.

Q. Anyone else?

A. No, other than I am also making reference to a very fine therapist. I drove over to Soap Lake in an attempt to relieve myself of pain during this treatment. This stemmed from Ed Turnsens, the therapist, who had two other patients he was taking over there. In discussing in his office ways of removing arthritic pain with heat, sunshine and therapy he mentioned this and I made a three-day trip with them in his car. I found that the waters at Soap Lake did relieve it somewhat, to an extent that [22] when I returned to Seattle I could take the whirlpool baths and therapy without quite so much pain. I suggested to the doctor that I try it again and he said "If it helped you, by all means try it over again."

Q. Is this Mr. Turnsens a physicians?

A. He is not a doctor. He is a therapist. Dr.

(Deposition of Hal Gilflen.)

McConville was the doctor. I had been taking ACTH alternately with cortisone shots to relieve the extreme pain. It was bone pain, right in the bone. They tried to get at with needles and they sure did. They used them continually. It was so painful for any manipulation of the arm or wrist or elbow and I could not lift my arm up to the shoulder. It was infected which was not suspected at first but in attempting to arrive at a cure they learned the shoulder was infected. There was so much pain it was impossible to determine where all of it was. I am aware of it because that shoulder is the serious part remaining, that and the elbow. The elbow will not bend except to a restricted degree.

Q. After you returned to Seward on the 25th of August, under whose care were you at that time.

A. Dr. Hall. No, no, that is not right. No, Hall was in between the third and fourth trips.

Q. After the fourth trip?

A. After the fourth trip I have not had any doctor in Seward either examine me or discussed it with any. I have communicated with Dr. McConville on several occasions since returning home [23] and describing the ache and how my arm was behaving, and advising him of the pain remaining and the restricted use.

Q. Have you been examined by any doctor since August 25th?      A. None.

Q. What course of treatment have you followed since 1955?

A. I purchased an elastic exercising rubber rope



(Deposition of Hal Gilfilen.)

affair, with a rubber rope going through a pulley on the floor and with handles. I use it quite a good deal. In fact I have almost worn the darn thing out. It keeps up the muscular use of the arm, although it is not clear yet at the elbow and shoulder joints.

Q. When, after August, 1955, were you first able to work?

A. I have not returned to full work. I have done four hours a day duty. I have done relief work on my bar. I was able to employ a crew and complete the construction of my building. I laid a portion of the cement in the basement floor and in that connection, I mean I screened the cement down. I tried to shovel and was good for just one day. I tried to get back to doing that kind of work but I am just no good at construction at all any more and I had to give it up, and that was my field.

Q. Prior to the February 12th injury—since February 12th have you regularly tended bar?

A. I have gone in there each time I returned home and I was able to do certain types of work but I couldn't carry cases or boxes of garbage. I hadn't been regularly employed on the bar because I was building a two-story steel and concrete structure which [24] was to have the Gateway Drug, two attorneys' offices and some others, as well as seven apartments upstairs also over the present building.

Q. How long prior to February 12th had you started your construction work and stopped tending bar?

(Deposition of Hal Gilfilen.)

A. I started June 1st, but I did relief shifts. In fact you just don't go out on the street in a place like Seward and hire bartenders. You have to have someone who knows what it is all about. So I did work at nights, even during the construction work. I worked all day on the building and nights on the bar.

Q. I believe you mentioned a date in July, or was it June—what year?

A. 1953, wasn't it Claire?

Q. A moment ago you said that each time, on returning to Seward from Seattle, you did certain types of work in the bar, but you couldn't carry cases of beer or liquor?

A. Yes.

Q. But you did work in the bar?

A. I tried to do so, but I would break so many glasses. I had no feeling so that unless I was watching and would look directly at something I would pick it up and then drop it. The first and second fingers and the thumb of the left hand have no feeling, it was just a numbness.

Q. Now, some place in your testimony you mentioned you had written a letter to the City Manager, putting them on notice of the fact [25] that you were going to hold them liable for your injury. I have a copy of the letter here. Will you read it and after you read it, state whether or not it is the letter you referred to with the exception of the red notation?

A. Yes, it is.

Q. Have you—strike that—was that the first time you had communicated or made known to the

(Deposition of Hal Gilflen.)

City of Seward the facts and circumstances of your injury?

A. No. I had written them previous to this. Without identifying anything I will say that as a matter of courtesy I had let them know I was going to return to Seattle for further treatment. I don't know the date of the letter but I recall writing it.

Q. Was that between the first and second trips that you made to Seattle?

A. After the first trip. However, I think I had written a letter before I went out stating that I had slipped and fallen. I notified them several times.

Q. Then undoubtedly the City Clerk would have copies? A. Yes.

Q. Do you have copies?

A. I am not sure. I usually keep them.

Q. Then to the best of your recollection you wrote them before you made your first trip out?

A. Yes.

Q. Now, with reference to the roadway on February 12, 1954, as contrasted [26] to the sidewalk with reference to accumulated ice and snow, what was its condition?

A. I am sure that there was a considerable accumulation on it. However, they do have a snow removal program but it is generally a program to let it pack down a little before taking it off. I am sure that there was considerable snow on the street—that is packed snow, at the time. Ice, too. Because we had had a little warm spell. We had had



(Deposition of Hal Gilflen.)

a fire that morning and all the water was frozen on the street. I can state that the City Manager had phoned me prior to my going out to tell me they were going—to tell the Planning and Zoning Commission they were going to let the Seward Bakery open without doing extensive repairs because they had a fire that same day.

Q. Where is that located?

A. Directly across the street. The fire was that same morning. Mrs. L. V. Ray and Pat Williams watched the firemen fight the fire.

Q. Now, have we pretty well covered the doctors whom you have seen? Drs. McConville, Mr. Turnsen, the therapist; Mrs. Aylen, the therapist; Dr. Staff, Dr. Phillips and Dr. Hall?

A. That is correct.

Q. Did any of those doctors, other than Dr. Phillips or Dr. McConville take X-rays?

A. No, they were the only two.

Q. Do you have a list of your hospital bills? [27]

A. Not in its entirety. There were some which were not sent me. I do have Dr. McConville's office call account here, and I have a complete itemization of Ed Turnsen, the therapist. I also have a bill from the Seward Sanitarium and I have one from Dr. Phillips and Dr. Hall. Incidentally, on Dr. Staff's billing it would be through Dr. Hall, whose place he was taking while Dr. Hall was absent. I also have a complete list of the medications and the shots and the date given but not the quantities or amounts. That would all have to come from the doc-

(Deposition of Hal Gilflen.)

tors' reports. I have all the statements with me that I have received to date but there are some I still do not have.

Q. Other than the Seward Hospital, during the course of your convalescence, were you confined to any hospital other than that?

A. None. Although I understand they had made reservations for me on Friday on the second trip. Dr. McConville had a telephone conversation with Providence Hospital to have me hospitalized with the intent, according to his statement, that they were going to force the elbow. They were going to pull the shoulder socket and force the elbow into a straight position.

Q. Now, when prior to June, 1953, had you last followed the construction business or work?

A. About sixteen years.

Q. My question was when before the time you started working on your building, had you last worked or followed the construction or building trade? [28]

A. Oh—I built what is known as Gil's Cocktail Lounge in 1950.

Q. And prior to 1950?

A. My last construction prior to that I had been Superintendent at the Prince Rupert Port of Embarkation.

Q. What year would that be?

A. In 1944. That was when I left there. Just prior to that I had been yard foreman for the Puget Sound Bridge & Dredging Company. I was

(Deposition of Hal Gilflen.)

employed on the construction of Navy floating dry docks for the Navy Department under contract with the Puget Sound Bridge & Dredging Company. And prior to that I was with Simms on the Japonski Navy Base at Sitka and at the Sand Point Navy Supply Base. I was either Assistant Superintendent, building Superintendent or carpenter foreman. I didn't do too much in the way of using tools, only at Sitka. I did there at Sitka.

Q. Now, you have requested a \$7,166.10 judgment for medical and hospital expenses incurred and I requested you, by subpoena duces tecum, to bring in an itemization of those expenses. Do you have them?

A. I have them almost complete. Some will need explanation and some are not verified in the true sense. I did not keep a daily accounting each time I spent a dollar but I have the checks which were issued during the time I was there. Let me say that I know how much it cost me and I have the checks. I borrowed on my insurance policies and borrowed from my mother and borrowed from a friend. [29]

Q. Well, to shorten this up. Will you be willing to leave them with Mr. Atkinson and if necessary I can make copies or have copies made?

A. Yes, sir. You can have my complete file.

Q. Now, with reference to your claim of \$13,675.00 for wages paid to a substitute while you were prevented from running your business? Do you have an itemization or balance sheet on that?

A. Only to this extent. My wife had to learn the

(Deposition of Hal Gilfilen.)

trade because all our monies were used up in the care of this arm. And she quit nursing and went to bartending. We are full partners in the business and she took it on. A regular employee is paid \$25.00 a shift and that amount is predicated upon my being absent from my business for a year and a half. I just took the straight figure of \$25.00. In all cases I do not have the cancelled checks to prove I paid it to someone but I know it cost money because I wasn't there. It would take a good many itemizations.

Q. Where was your wife working at the time she quit?

A. She was not employed by anyone else. She was managing our affairs while I was busy on the construction. But she is not a bartender and she kept her registration up and was subject to call as a nurse in Seward.

Q. When was her last prior nursing job?

A. (Witness pauses.)

Mrs. Gilfilen: It was in December, 1951, I quit. Afterwards I did specializing around there for my friends and everything. [30]

Q. Did you bring with you your employment and tax records? A. Yes.

Q. Would you be willing to leave those with Mr. Atkinson?

A. I don't have 1955, but I have the quarterly records and I have all the rest of them.

Q. But you did bring copies of 1952, 1953 and

(Deposition of Hal Gilfilen.)

1954, and I understand Mr. Jones is preparing 1955?      A. Yes.

Q. You have no objection to those being left with Mr. Atkinson so that I may inspect them and if necessary make copies, and will you authorize Mr. Jones to discuss the 1955 returns?

A. Yes, I will write a letter.

Q. Did you bring any other documents or letters except the ones offered in evidence?

A. I have the cancelled checks and the airline ticket stubs and the expenses of the hotel.

Mr. Atkinson: Well, that would be a part and parcel of these other expenses.

Mrs. Gilfilen: We have all our cancelled checks that we have written in 1954 and you can have the cancelled checks when Mr. Jones is through with them.

Q. So that we can obtain a background to obtain further information, you have no objection to being examined by a doctor here in Anchorage, do you, at a time suited to your convenience?

A. None whatever. It is agreeable. [31]

Q. Did you, at any time, consult a doctor in Anchorage with reference to your injury?

A. No, I did not.

Q. Will you explain why you went to Seattle instead of Anchorage?

A. I knew of no doctor who specialized in that work and I was advised by my doctor to go to a specialist and also by a very good friend of mine who is a doctor, Dr. Joe Sheldon, to hurry to a



(Deposition of Hal Gilflen.)

specialist because of the discoloration and the veins being so purple and distended. He feared then it would have to be amputated, although I had no idea it was so infected.

Q. You say Dr. Sheldon told you to go to a specialist?      A. Yes.

Q. What did Dr. Phillips advise?

A. Well, Dr. Phillips was quite busy at that time and on the two or three occasions when he did get a chance to examine it and we discussed it he said he felt it was beyond him and he didn't know what to do next. It had got to that point then. I have learned since that was the smartest thing I ever did do. There was complete atrophy by the time I arrived in Seattle—it was gone.

Q. Is that the Dr. Sheldon who is presently practicing as an ENT man here in Anchorage?

A. Yes. However, that was not his field and he was just a very good friend of ours.

Q. You earlier mentioned Mr. Berne, Mr. Woods and Mr. O'Hara as [32] being witnesses to this accident or some portion thereof, and you have stated the names of all the doctors. Now, do you have the names of any other persons who might have relevant knowledge with the exception of your wife?

A. I was taken into my place of business before being put in his car by Ray O'Hara and he told my bartender, named Smith, that he was going to have to go to the hospital and for him to get in contact with my wife.

Q. Then other than Mr. Berne and Mr. Woods—



(Deposition of Hal Gilflen.)

they would be the only eye witnesses to this accident?      A. Yes.

Q. If the names of any others come to your memory, would you make those available to Mr. Atkinson who can give them to me?

A. Yes, I would.

Q. I believe that is all I have, Ken. Oh, one further thing. I would like to have this diagram attached to the deposition. One further question. On the copy of this letter you did not put on the date "30 June, '54," did you?

A. I don't think I did.

Q. Then it is your present recollection you did not date it? Do you know who did or when it was put on?

A. Let me examine it, will you? It might be mine. I use the date that way when you work around military posts. No, it is not my writing.

Q. But with the exception of the writing, it is a copy of your [33] letter?

A. Yes, it is a true copy.

Mr. Atkinson: No cross-examination.

(Whereupon, at the hour of 3:30 p.m., on the 23rd day of February, 1956, the witness was excused.)

/s/ HAL GILFLEN.

United States of America,  
Territory of Alaska—ss.

I, Gara H. Lyon, a Notary Public duly commissioned and qualified in and for the Territory of Alaska, do hereby certify that, pursuant to notice hereto attached and made a part hereof, there came before me on the 23rd day of February, 1956, at the hour of 2:00 p.m., at the office of Raymond E. Plummer, 225 Central Building, Anchorage, Alaska, the following named person—to wit: Hal Gilfilen, who was by me duly sworn to testify to the truth and nothing but the truth of his knowledge touching and concerning the matters in controversy in this cause; that he was thereupon carefully examined upon his oath and such testimony taken by me in shorthand and reduced to writing; that this deposition is a true record of such testimony.

I further certify that the deposition was then mailed to said deponent at Seward, Alaska, for reading and signing and was redelivered to me.

I further certify that I am neither attorney nor counsel for [34] nor related to or employed by, any of the parties to the action in which this deposition is taken, except as to employment for the purpose of taking this deposition in my capacity as Public Stenographer and Notary Public, and further than I am not a relative or employee, except as above stated, of any attorney or counsel employed by the parties or interested financially, or otherwise, in this action.

I further certify that the original of this deposition has been delivered by me to the Clerk of the

District Court, District of Alaska, Third Division,  
Anchorage, Alaska, for filing in this cause, as re-  
quired by law.

In Witness Whereof, I have hereto set my hand  
and official seal this 14th day of March, 1956.

[Seal]      /s/ GARA H. LYON,  
Notary Public in and for the  
Territory of Alaska.  
My Commission Expires November 1, 1958.

Acknowledgment

United States of America,  
Territory of Alaska—ss.

This Is to Certify that on this 9th day of March,  
1956, before me, the undersigned, a Notary Public  
in and for Alaska, personally appeared Hal Gilflen,  
known to me and to me known to be the person  
named in and who signed the foregoing deposition  
and acknowledged to me that he signed the same  
freely and voluntarily for the purposes therein set  
forth.

Witness my hand and notarial seal hereto affixed  
the day and year in this certificate first above  
written.

[Seal]      /s/ EARL M. GREGORY, JR.,  
Notary Public in and for  
Alaska.

My Commission Expires August 20, 1956.

[Endorsed]: Filed March 14, 1956. [35]

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT  
BY DEFENDANT

The defendant, City of Seward, an Alaskan municipal corporation, through its attorney, Raymond E. Plummer, hereby moves the Court to enter summary judgment for the defendant in accordance with the provisions of Rule 56, Federal Rules of Civil Procedure, on the ground that the records, files, and depositions herein, and the affidavit attached hereto show:

1. That the City of Seward was under no legal obligation, with respect to the plaintiff, to remove natural accumulations of ice and snow from its sidewalks, and therefore the complaint fails to state any cause of action; and

2. That the plaintiff, as a matter of law, was guilty of contributory negligence and assumed the risk of whatever injuries he incurred, and is consequently precluded from any recovery; and therefore the defendant is entitled to summary judgment as a matter of law.

RAYMOND E. PLUMMER,

/s/ J. J. DELANEY, JR.,

Attorney for Defendant.

Service of copy acknowledged.

[Endorsed]: Filed February 25, 1957.

[Title of District Court and Cause.]

STATEMENT OF GENUINE ISSUES

Plaintiff contends that the following are genuine issues necessary to be litigated, and which should preclude the granting of defendant's motion for summary judgment:

1. That whether or not plaintiff was contributorily negligent is a question of fact, not law, for the jury to decide, in view of all facts to be adduced at the trial of this matter.

2. That whether or not the snow and ice which had accumulated upon the sidewalk in question was a "natural" accumulation is a question of fact, not law.

3. That whether or not the plaintiff assumed the risk of injury when he walked upon the sidewalk in question is a question of fact.

McLAUGHLIN & ATKINSON,  
Attorneys for Plaintiff.

By /s/ KENNETH R. ATKINSON.

Service of copy acknowledged.

[Endorsed]: Filed March 28, 1957.

[Title of District Court and Cause.]

No. A-11,718

AFFIDAVIT IN SUPPORT OF DEFEND-  
ANT'S MOTION FOR SUMMARY JUDG-  
MENT

United States of America,  
Territory of Alaska—ss.

Raymond E. Plummer, being first duly sworn,  
upon oath deposes and says:

That he is the attorney for the defendant, City of Seward, in the action herein; that this lawsuit was filed on December 16, 1955, by Hal Gilflen against said defendant, City of Seward; that in his complaint the plaintiff alleges that he slipped upon a sidewalk in the defendant city upon which "snow and ice had accumulated \* \* \* to such an extent that travel over, across, and upon the same was insecure and unsafe for pedestrians and that said snow and ice was accumulated upon said sidewalk in an irregular shape; was packed and frozen, and so elevated, uneven, and ridged as to afford an insecure footing to those walking upon said sidewalk." (Paragraph IV of complaint.)

That on February 23, 1956, the plaintiff's deposition was taken before Gara Lyon, a qualified Notary Public, in the affiant's office, Room 220, Central Building, Anchorage, Alaska.



That during the course of his deposition the plaintiff, Hal Gilflen, stated in answer to questions put to him by affiant: that the condition of accumulated ice and snow on the sidewalk upon which he slipped was plainly visible (Page 8 of deposition); that during the thirty-day period immediately prior to the accident, he had walked past the place where he fell "most every day" (Page 6 of deposition); and that he knew of other persons in Seward who had fallen at the same point on the sidewalk because of the ice and snow thereon (Page 8 of deposition).

And the above referred to questions of the affiant and the answers and statements of the plaintiff, Hal Gilflen, in response thereto, are hereby incorporated in this affidavit as though fully set forth herein.

/s/ RAYMOND E. PLUMMER,  
Attorney for Defendant.

Subscribed and Sworn to before me this 21st day of February, 1957.

/s/ JAMES J. DELANEY, JR.,  
Notary Public for Alaska.

My commission expires: 8-27-60.

Service of copy acknowledged.

[Endorsed]: Filed February 25, 1957.

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on for hearing upon defendant's motion for summary judgment, defendant being represented by Raymond E. Plummer, his attorney of record, and plaintiff being represented by McLaughlin & Atkinson, his attorneys of record, and the Court being fully advised in the premises,

The Court Doth Find:

1. This Court has jurisdiction over the parties and the subject matter of this action.

2. That on February 12, 1954, the plaintiff slipped upon a sidewalk covered with ice and snow in the City of Seward, Alaska.

3. That the accumulation of ice and snow upon which the plaintiff slipped was a natural accumulation.

4. That the plaintiff slipped on the said sidewalk by reason of his own contributory negligence.

5. That the plaintiff knew the condition of the sidewalk, and voluntarily attempted to pass over it, and assumed the risk of any injuries incurred thereby.

Wherefore, the Court Doth Conclude:

1. That the City of Seward, defendant herein, was under no legal obligation, with respect to the

plaintiff, to remove natural accumulations of ice and snow from its sidewalks; and, therefore the complaint fails to state a claim for relief.

2. That, as a matter of law, the plaintiff was guilty of contributory negligence, and assumed the risk of whatever injuries he incurred; and is consequently precluded from any recovery.

3. That defendant is entitled to summary judgment as a matter of law.

Dated at Anchorage, Alaska, this 22nd day of August, 1957.

J. L. McCARREY, JR.

Service of copy acknowledged.

[Endorsed]: Filed August 22, 1957.

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In the District Court for the District  
of Alaska, Third Division

No. A-11,718

HAL GILFILEN, an Individual,

Plaintiff,

vs.

CITY OF SEWARD, an Alaskan Municipal Corporation,

Defendant.

### JUDGMENT

This matter having come on for hearing on defendant's motion for summary judgment, defendant

being represented by Raymond E. Plummer, his attorney of record, and plaintiff being represented by McLaughlin & Atkinson, his attorneys of record, and the Court being fully advised in the premises, and Findings of Fact and Conclusions of Law having been heretofore entered herein, it is

Ordered, Adjudged and Decreed that the defendant's motion for summary judgment be, and the same hereby is, granted, that the plaintiff have and recover nothing by his complaint, that the defendant, City of Seward, go hence without day, and that defendant recover its costs and charges in its behalf expended and have execution therefore.

Signed and ordered entered at Anchorage, Alaska, this 22nd day of August, 1957.

/s/ J. L. McCARREY, JR.,  
District Judge.

Service of copy acknowledged.

[Endorsed]: Filed and entered August 22, 1957.

In the District Court for the District of Alaska,  
Third Division

Cause No. A-11,718

HAL GILFILEN,

Plaintiff,

vs.

CITY OF SEWARD, an Alaskan Municipal Corporation,

Defendant.

NOTICE OF APPEAL

Notice Is Hereby Given that Hal Gilflen, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on August 22, 1957.

McLAUGHLIN & ATKINSON,  
Attorneys for Appellant,

By /s/ KENNETH R. ATKINSON.

[Endorsed]: Filed September 30, 1957.

[Title of District Court and Cause.]

### STIPULATION

This stipulation made and entered into this 8th day of October, 1957, by and between the above named parties;

#### Witnesseth That

Whereas by a judgment entered in this action on August 22, 1957, the Court granted Summary Judgment for the defendant, and further ordered, adjudged and decreed that defendant recover its costs and charges in its behalf expended and have execution therefor;

And whereas, the Court thereafter, pursuant to defendant's motion, by a minute order entered September 6, 1957, allowed defendant as part of its costs an attorney's fee in the sum of \$300.00; and

Whereas the parties are in agreement that defendant's costs amount to \$51.25;

Now, Therefore, it is stipulated and agreed that the amended judgment affixed hereto shall be substituted for the judgment previously entered on August 22, 1957;

It is further stipulated that plaintiff may continue to prosecute his appeal from the judgment entered on August 22, 1957; or, at his option, and in the alternative, plaintiff may take a new appeal from the judgment as amended.



Dated at Anchorage, Alaska, this 8th day of October, 1957.

/s/ KENNETH R. ATKINSON,  
Attorney for Plaintiff.

RAYMOND E. PLUMMER,

By /s/ JAMES J. DELANEY,  
Attorney for Defendant.

[Endorsed]: Filed October 8, 1957.

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[Title of District Court and Cause.]

### AMENDED JUDGMENT

This matter having come on for hearing on defendant's Motion for Summary Judgment, defendant being represented by Raymond E. Plummer, his attorney of record, and plaintiff being represented by McLaughlin & Atkinson, his attorneys of record, and the Court being fully advised in the premises, and Findings of Fact and Conclusions of Law having been heretofore entered herein, it is

Ordered, Adjudged and Decreed that the defendant's Motion for Summary Judgment be, and the same hereby is, granted, that the plaintiff have and recover nothing by his complaint, that the defendant, City of Seward, go hence without day, and that defendant recover its costs and charges in its behalf expended in the amount of \$51.25, and attorney's

fees in the amount of \$300.000, and have execution therefore.

Signed and ordered entered at Anchorage, Alaska, this 9th day of October, 1957.

/s/ J. L. McCARREY, JR.,  
District Judge.

Service of copy acknowledged.

[Endorsed]: Filed and entered October 9, 1957.

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[Title of District Court and Cause.]

#### NOTICE OF APPEAL

Notice Is Hereby Given that Hal Gilflen, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment entered in this action on August 22, 1957, and from the amended judgment entered on the 9th day of October, 1957.

McLAUGHLIN & ATKINSON,  
Attorneys for Appellant.

By /s/ KENNETH R. ATKINSON.

Service of copy acknowledged.

[Endorsed]: Filed October 22, 1957.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE  
ORIGINAL RECORD

I, Wm. A. Hilton, Clerk of the above-entitled court, do hereby certify that pursuant to Rule 10 (1) of the Rules of the United States Court of Appeals, Ninth Circuit, and Rules 75 (g) and 75 (o) of the Federal Rules of Civil Procedure and the stipulation designating record on appeal together with appellant's statement of points, I am transmitting herewith the Original Papers in my office dealing with the above-entitled action or proceeding.

The papers herewith transmitted constitute the record on appeal to the United States Court of Appeals, Ninth Circuit, San Francisco, California, from Judgment filed and entered in the above-entitled cause August 22, 1957, and from the Amended Judgment filed and entered in the above-entitled cause October 9, 1957.

Dated at Anchorage, Alaska, this 13th day of January, 1958.

/s/ WM. A. HILTON,  
Clerk.

[Title of District Court and Cause.]

### CLERK'S SUPPLEMENTAL CERTIFICATE

I, Wm. A. Hilton, Clerk of the District Court for the District of Alaska, Third Division, do hereby certify that the hereunto attached "Stipulation" and "Statement of Genuine Issues" are the Originals thereof as filed in my office dealing with the above-entitled action or proceeding.

The original papers hereto attached are to supplement and become a part of the original papers transmitted to the United States Court of Appeals, Ninth Circuit, San Francisco, California, on the 13th day of January, 1958.

Dated at Anchorage, Alaska, this 10th day of February, 1958.

[Seal]      /s/ WM. A. HILTON,  
Clerk.

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[Endorsed]: No. 15854. United States Court of Appeals for the Ninth Circuit. Hal Gilflen, Appellant, vs. City of Seward, a Municipal Corporation, Appellee. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Third Division.

Filed: January 16, 1958.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 15,854

HAL GILFILEN,

Appellant,

vs.

CITY OF SEWARD, a Municipal Corporation,

Appellee.

STATEMENT OF POINTS ON APPEAL

Appellant herein states that the points upon which Appellant intends to rely on this appeal are as follows:

1. The District Court erred in granting Defendant's motion for summary judgment and in entering a judgment and amended judgment for defendant thereon.

2. The District Court erred in finding as a matter of fact and ruling as a conclusion of law that the plaintiff was guilty of contributory negligence.

3. The District Court erred in finding as a matter of fact and ruling as a conclusion of law that plaintiff's alleged contributory negligence was the actual as well as the proximate cause of plaintiff's injury.

4. The District Court erred in finding as a matter of fact and ruling as a conclusion of law

that the plaintiff in lawfully passing over and across a sidewalk of and within the defendant City assumed the risk of any injuries incurred thereby.

5. The District Court erred in adopting and thereby finding as a matter of law that the hazardous condition of defendant's sidewalk which caused plaintiff's injury was due to a "natural accumulation" of snow and ice.

6. The District Court erred in failing and refusing to submit the above-referred-to genuine issues of fact to the determination of a jury, as demanded by plaintiff.

McLAUGHLIN & ATKINSON,  
and  
BOYKO, TALBOT & TULIN.

By /s/ EDGAR PAUL BOYKO,  
Of Counsel for Appellant.

[Endorsed]: Filed February 10, 1958.

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[Title of District Court and Cause.]

### STIPULATION

To the Clerk of Said Court:

The parties hereby stipulate and agree that the statement of genuine issues filed by plaintiff in the District Court, in opposition to defendant's motion



for summary judgment therein, be designated and included in the record on appeal, together with this stipulation, and that the same be in addition to the designation contained in the stipulation, dated the 22nd day of November, 1957.

/s/ RAYMOND E. PLUMMER,  
Of Counsel for Appellee.

/s/ KENNETH R. ATKINSON,  
Attorneys for Appellant.

[Endorsed]: Filed February 11, 1958.

